STATE OF MICHIGAN

COURT OF APPEALS

CONNIE RUSSELL, Plaintiff-Appellee,	UNPUBLISHED May 23, 2006
v	No. 263903 Wayne Circuit Court
PBG MICHIGAN, LLC, Defendant-Appellant.	LC No. 04-427528-CZ

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In this action alleging discrimination[1] under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, defendant appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse and remand for entry of judgment in favor of defendant.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(7) and (10). In reviewing a motion under MCR 2.116(C)(7), this Court accepts the contents of the complaint as true unless they are directly contradicted. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). We consider the pleadings, affidavits, depositions, admissions, and other admissible documentary evidence. *Id*. In the absence of a disputed fact, we review de novo whether a claim is barred by the applicable statute of limitations. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004).

An action under the CRA must be brought within three years. MCL 600.5805(1), (10); *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 266; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). Defendant argues that the trial court erroneously denied its motion for summary disposition because plaintiff suffered no discriminatory action within the three years immediately before she filed her complaint. In contrast, plaintiff cites

[1] Plaintiff asserts two claims of racial discrimination, based on theories of hostile work environment and discrete race discrimination. Plaintiff voluntarily dismissed her sexual harassment and gender discrimination claims, which are not at issue in this appeal.

Magee v DaimlerChrysler Corp, 472 Mich 108; 693 NW2d 166 (2005), for the proposition that her claims accrued on her last day of active employment. We agree with defendant.

In *Magee, supra*, the plaintiff went on medical leave on September 12, 1998, and without returning to work resigned her employment on February 2, 1999. *Id*. at 109-110. She filed an action under the CRA on February 1, 2002, alleging that "she had been unlawfully discriminated against and harassed during most of her twenty-two years at DaimlerChrysler." *Id*. at 110. She alleged that the harassment continued until September 12, 1998, her last day of active employment. *Id*. The trial court granted DaimlerChrysler's motion for summary disposition based on the statute of limitations. *Id*. at 111. On appeal, our Supreme Court stated:

> To determine whether Magee's claims were timely filed, we look to MCL 600.5805(10), which establishes that the applicable period of limitations is three years from the date of injury. Because Magee alleged no discriminatory conduct occurring after September 12, 1998, the period of limitations on Magee's claims expired, at the latest, three years from that date, or by September 12, 2001. Accordingly, as the trial court held, Magee's February 1, 2002, complaint was not timely filed. [*Id*. at 113.]

Plaintiff in the instant case interprets *Magee* as holding that her claims accrued on her last day of active employment. Contrary to plaintiff's argument, the *Magee* Court did not rely on the date of September 12, 1998, to hold that the claims in that case had accrued on the plaintiff's last day of work. Instead, the Court simply measured the limitations period from the plaintiff's last day worked because the plaintiff did not allege any discriminatory conduct occurring after that day. The *Magee* Court stated that the statute of limitations had expired *at the latest* three years from the plaintiff's last day of work.

Thus, the *Magee* Court made clear that a CRA claim is not timely filed if no instance of alleged discriminatory conduct occurs within the three-year period immediately preceding the filing of the complaint. "[P]laintiff's claims were not filed within the limitations period because none of the alleged discriminatory or retaliatory conduct occurred within the three years that preceded the filing of the complaint." *Id*. at 109. Because one of the claims raised by the plaintiff in *Magee* was based on a theory of hostile work environment, that case is particularly pertinent to the instant action.[2] *Id*. at 110.

In her complaint, plaintiff set forth a hostile-work-environment claim based on race. Our Supreme Court has not specifically addressed whether the CRA encompasses hostile-work-environment claims that are premised on discriminatory conduct of a non-sexual nature. *Haynie v Michigan State Police*, 468 Mich 302, 319 n 18; 664 NW2d 129 (2003); *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996). However, this Court has recognized that

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[2] Our Supreme Court subsequently reaffirmed the holding of *Magee*, again ruling that all CRA claims are governed by the three-year limitations period of MCL 600.5805(1) and (10). *Garg, supra* at 282-284. However, unlike the plaintiff in *Magee*, the plaintiff in *Garg* did not assert a hostile-work-environment claim.

actionable hostile-work-environment claims may be based on discriminatory conduct concerning any statutorily protected classification. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 626-627; 576 NW2d 712 (1998); see also *Malan v Gen Dynamics Land Systems, Inc*, 212 Mich App 585, 586-587; 538 NW2d 76 (1995).

> In order to establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Downey, supra* at 629.]

Under *Magee*, in order for plaintiff's complaint to be timely, the alleged discriminatory conduct on which plaintiff relies must have occurred within the three-year period immediately preceding the filing of plaintiff's complaint. *Magee, supra* at 109. Of note, plaintiff filed her complaint on September 3, 2004.

Plaintiff has failed to produce evidence that any conduct occurring on or after September 3, 2001, contributed to the alleged hostile work environment.[3] The only arguably wrongful conduct occurring after September 3, 2001, was the issuance of a work performance notice by plaintiff's supervisor on September 6, 2001. However, this notice concerned plaintiff's apparent refusal to train a coworker, and plaintiff presented no admissible evidence that the notice was issued for racial or otherwise-discriminatory reasons. In fact, plaintiff testified that her supervisor never said anything inappropriate about her race, and when asked why she had refused to sign the notice, plaintiff merely stated that she believed the notice was untimely under company policy and that certain factual details contained in the notice were inaccurate. Plaintiff never indicated as a reason for refusing to sign the notice that she believed it was motivated by discrimination.

In sum, there is no genuine question of fact regarding whether the September 6, 2001 work performance notice was issued for discriminatory reasons, or whether it contributed to the racially charged hostile work environment. Because plaintiff has not identified any discriminatory conduct occurring on or after September 3, 2001, her hostile-work-environment claim was time-barred by the three-year period of limitations.[4]

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[3] On appeal, plaintiff suggests that certain discriminatory conduct may have occurred after September 3, 2001. However, we will not consider evidence that is presented for the first time in this Court. Our review is limited to the record established in the trial court, and an appellant may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

[4] We acknowledge plaintiff's argument that unlike a CRA claim based on discrete discrimination, a CRA claim based on a hostile work environment does not accrue until the last

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Plaintiff also set forth a claim of discrete race discrimination in her complaint. Review of this claim is arguably unpreserved because the trial court did not decide it. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 341; 632 NW2d 525 (2001). Nonetheless, we will consider the matter because it presents a question of law and the facts necessary for resolution are not in dispute. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). A CRA claim based on discrete discrimination is subject to the same three-year period of limitations as a hostile-work-environment claim. *Garg, supra*. Therefore, in light of plaintiff's failure to identify any specific discriminatory incident occurring on or after September 3, 2001, her race-discrimination claim was time-barred as well.

Plaintiff argues that the statute of limitations was tolled because of insanity. Plaintiff's insanity argument is wholly based on the fact that she was admitted to a psychiatric hospital shortly after she left work on September 14, 2001, and that she was later declared disabled because of her mental condition. MCL 600.5851(1) provides in relevant part:

> Except as otherwise provided . . . if the person first entitled to make an entry or bring an action under this act is under 18 years of age or *insane at the time the claim accrues*, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. [Emphasis added.]

Under MCL 600.5827, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." Thus, in order for plaintiff to successfully invoke the insanity tolling provision, she must show that she was insane at the time the alleged discriminatory conduct occurred.

The discriminatory conduct that occurred closest in time to the filing of plaintiff's complaint involved the discovery of a noose, found at plaintiff's worksite on May 9, 2001, and damage to plaintiff's car, which occurred shortly thereafter. Excluding the noose incident and the damage to plaintiff's car, plaintiff could not recall any other racially discriminatory incidents that occurred before she took medical leave in September 2001. Because plaintiff does not argue that she was insane at the time of the noose incident or the damage to her automobile, MCL 600.5851(1) did not toll the statute of limitations with respect to plaintiff's CRA claims. Plaintiff cannot avail herself of the insanity tolling provision in this case.

Because plaintiff presented no evidence of discriminatory conduct that occurred within three years immediately preceding her complaint, defendant was entitled to summary disposition

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day of active employment. Because of the apparent distinctions between discrete discrimination claims and hostile-work-environment claims, we might otherwise be inclined to agree with plaintiff's contention. However, plaintiff's argument quite simply runs afoul of *Magee*. Even after *Magee*, it appears that a hostile-work-environment claim is timely so long as any single incident that contributed to the hostile environment occurred within the three years immediately preceding the complaint. However, under *Magee* a plaintiff must identify *at least one* such incident that occurred within the statutory three-year period. Here, plaintiff has failed to identify any specific racially charged incident that occurred within that statutory three-year period.

of the hostile-work-environment claim under MCR 2.116(C)(7). For the same reason, defendant was entitled to summary disposition of the race-discrimination claim as well.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey